United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7381

UNITED STATES COURT OF APPEALS

For the Second Circuit

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs Appellees,

vs.

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York, WILLARD A. GENRICH, a member of the Board of Regents, THE BOARD OF REGENTS OF THE STATE OF NEW YORK and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants Appellants.

Appeal from the United States District Court for the

Western District of New York

BRIEF FOR PLAINTIFFS APPELLEES

DAAN BRAVEMAN, ESQ.
GREATER UP STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
80 West Main Street
Rochester, New York 14614

STUART R. COHEN, ESQ.
GEORGE H. HEZEL, ESQ.
LEGAL AID BUREAU OF BUFFALO
281 Ridge Road West
Lackawanna, New York 14218

NATHANIEL JONES, ESQ.
N.A.A.C.P.
1790 Broadway
New York, New York 10010
Attorneys for Plaintiffs-Appellees

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(Answered in the affirmative by the district court)

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(Answered in the affirmative by the district court).

WHETHER VENUE LIES IN THE WESTERN DISTRICT OF NEW YORK WHERE ONE OF THE DEFENDANTS RESIDES AND PLAINTIFFS' CLAIM AROSE.

(Answered in the affirmative by the district court).

STATEMENT OF THE CASE

Defendants-Appellants filed the instant appeal from a decision and order of the Hon. John T. Curtin denying defendants' motion to dismiss the complaint.

Plaintiffs-Appellees are parents of children in the Lackawanna and Buffalo public school systems. Defendant-Appellants are the Board of Regents of the State of New York, Joseph W. McGovern, Chairman of the Board of Regents, Willard A. Genrich, a member of the Board of Regents, and Ewald B. Nyquist, Commissioner of Education for the State of New York. (A.7).

Plaintiffs instituted this action for declaratory relief seeking to challenge the constitutionality of a policy statement issued by the Board of Regents on January 22, 1975. (A.8). That statement provides in pertinent part:

> "Integration does not, by definition, require that racial quotas be used in determining the proper desirable composition of population within a school. If a school district is making, and has made, a serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its

> student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district."

(A.9).

Plaintiffs maintain that the policy's historical context, immediate objective and ultimate effect reveal that the policy serves to perpetuate racial discrimination and segregation in the Buffalo and Lackawanna school systems. (A.11). The historical context of the January statement consists of a familiar - but, nevertheless, deplorable - pattern of delay in the integration of schools. More than ten years ago - on February 15, 1965 - former Commissioner of Education James E. Allen found that the Buffalo School system was severely segregated and ordered the Buffalo School Board to prepare a desegregation plan. (A.4). The School Board refused to design such a plan and exhibited what defendant Nyquist has characterized as "willful defiance" of the Commissioner's order. (A.4). In a decision dated January 14, 1975, defendant Nyquist found that the Buffalo School Board "has not only neglected to develop and implement a plan for racial integration of its schools, but by certain of its acts, procedures, and policies, has increased segregation within its schools." (A.4-5). Accordingly, defendant Nyquist ordered the Buffalo School Board to show cause on February 14, 1975, why a plan for the integration of the Buffalo public schools should not be implemented immediately. (A.4).

Efforts to eliminate racial imbalance in the Lackawanna School System have been equally unsuccessful. On February 8, 1971, defendant Nyquist issued a decision and order declaring that since Lackawanna pupils were being forced to attend segregated and inferior schools, the Lackawanna School Board must submit a voluntary desegregation plan (A.5). However, this effort failed because, as defendant Nyquist subsequently held, the school board "rejected cooperative efforts to develop such a plan. ..." (A.5). On January 14, 1975, defendant Nyquist ordered the Lackawanna School Board to show cause on February 10, 1975, why a desegregation plan should not be implemented. (A.5-6).

Eight days after those show cause orders were issued, the Board of Regents adopted the challenged January policy statement with this historical background in clear view. The purpose and intent of the statement was to prevent defendant Nyquist from proceeding with his integration plans which were based upon racial proportions and were designed to obtain a racial balance in the Buffalo and Lackawanna school systems.[1] (A.6,9). Defendant McGovern declared that the policy statement represents a "dilution" of the Regents' earlier support for integration. (A.9). Defendant Genrich, who was recently placed on the Baord of Regents for the purpose of opposing meaningful integration efforts (A.7), made it clear that the January statement represented a change in policy. Indeed,

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[1] Defendant Nyquist had also issued orders to show cause to the school boards of Utica, Newburgh and Mt. Vernon. (A.6).

defendant Genrich stated, "It is his [the Commissioner's] duty to enforce the policy of the Board of Regents, and I assume he will consider his orders in the light of this new situation." (A.9-10).

The Board of Regents' January statement had its intended effect. On January 30, 1975, a few days after the Regents' policy statement, defendant Nyquist indefinitely postponed the hearings on the orders to show cause. Despite a subsequent Regents' statement, dated February 20, 1975, and an indication that hearings would be held on the orders to show cause (A.43), the January statement continues to have its adverse impact. Integration plans for Buffalo and Lackawanna have neither been adopted, nor implemented. Any meaningful attempt to desegregate the schools has been postponed for at least another year (A.10). Indeed, another order to show cause has not even been served upon the Buffalo School Board. As a result, children in these school districts continue to be forced to attend segregated schools and suffer the denial of equal educational opportunity. In these circumstances, it is simply a callous indifference to the facts to state that the January policy resulted in "mere delay" in the integration of the school systems (Appellant's Brief at 11).

Notwithstanding the fact that the January statement had - and continues to have - the effect of preventing desegregation of the Buffalo and Lackawanna school systems, defendants moved to dismiss plaintiffs' complaint. (A.27). Defendants asserted that the district court lacked jurisdiction, that venue was improper, that plaintiffs failed to state a valid claim, and that the action was

moot. The district court considered each of these assertions and, by decision and order, dated June 9, 1975, denied defendants' motion to dismiss. Defendants now seek to appeal the denial of that motion to dismiss.

POINT I

THIS COURT LACKS JURISDICTION TO REVIEW THE DENIAL OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs-Appellees respectfully submit that this court lacks jurisdiction to entertain defendants' appeal of the denial of their motion to dismiss. It is well established that denial of a motion to dismiss is not a final order and is not appealable under 28 U.S.C. §1291. Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 390 (2d Cir. 1975); Brannon v. Warn Bros., Inc., 508 F.2d 115, 118 (9th Cir. 1974); Flour Ocean Services, Inc. v. Hampton, 502 F.2d 1169, 1170 (5th Cir. 1974); 2A Moore's Federal Practice ¶12.14 at 2338. Moreover, it is equally clear that denial of a motion to dismiss is not reviewable even when, as here, the motion is based upon jurisdictional grounds. Catlin v. United States, 324 U.S. 229, 236 (1945); Wallace v. Norman Industries, Inc., 467 F.2d 824 (5th Cir. 1972); Fleming v. Berardi, 441 F.2d 732 (3d Cir. 1971). For example, in Wallace v. Norman Industries, Inc., supra, the district court - as in the instant case - refused to dismiss the complaint on the basis of alleged defects in jurisdiction and venue; the Fifth Circuit held that the denial was not appealable. Id. at 826.

Defendants attempt to circumvent this limitation on appellate jurisdiction by suggesting that an appeal lies under 28 U.S.C. §1292(a). That section provides:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a district review may be had in the Supreme Court;
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;
> (4) Judgments in civil actions for patent infringement which are final except for accounting."

Manifestly, Section 1292(a) makes no reference whatsoever to an appeal from an interlocutory order denying a motion to dismiss.

Defendants, however, advance the notion that denial of their motion to dismiss "in effect refuses a permanent injunction against plaintiffs-appellees prosecuting this action at law" and that, therefore, an appeal is proper under Section 1292(a)."(Appellant's Brief at 6-7). In so doing, defendants assert that Enelow v. New York Life Insurance Co., 293 U.S. 310 (1935) and Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 163 (1942), support their rather attenuated argument.

Plaintiffs contend that defendants' reliance upon Enelow v. New York Life Insurance Co., supra, and Ettelson v. Metropolitan Life Insurance Co., supra, is misplaced and that the doctrine enunciated in these cases has no relationship whatsoever to the issue before this court. The Enelow-Ettelson rule relates only to the appealability of an order granting or refusing a stay of proceedings and provides that such an order is appealable if:

> "(a) the action in which the motion for a stay was made could have been maintained as an action at law before the merger of law and equity, and (b) the stay was sought to permit prior determination of an equitable defense or counterclaim."

Brannon v. Warn Bros., Inc., supra. See also, Garner Lumber Company v. Randolph E. Valenzi, Lange, Inc., 513 F.2d 1171 (4th Cir. 1975); Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304, 308 (2d Cir. 1967). The Enelow-Ettelson doctrine applies only to motions for a stay which plainly are separate and distinct from motions to dismiss a complaint. Indeed, in Brannon v. Warn Bros., Inc., supra, the court ascertained an appeal from an order refusing a stay, but held that it lacked jurisdiction to hear an appeal of a denial of a motion to dismiss. Id. at 118.

Here, the only motion before the district court was defendant's request for dismissal of the complaint.[2] Defendants have not

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[2] The district court stated that since the record has been supplemented by affidavits, the motion to dismiss may be considered one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (A.110). However, the denial of a motion for summary judgment is also not appealable. Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378, 390 (2d Cir. 1975).

cited - and plaintiffs are unable to find - a single authority for the notion that an interlocutory appeal may be taken from the denial of such a motion.[3] Accordingly, it must be concluded that the denial of defendants' motion to dismiss is an interlocutory decision which this court lacks jurisdiction to review.

For the foregoing reasons, defendants' appeal should be dismissed. Moreover, even assuming - only for the sake of argument - that this court has jurisdiction to hear the appeal, it is clear that the district court properly denied defendants' motion to dismiss.

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[3] The district court's order denying defendants' motion to dismiss is not appealable under 28 U.S.C. §1292(b) since that court did not certify the question.

POINT II

PLAINTIFFS HAVE STATED A CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACT, 42 U.S.C. §1983, IN THAT THEY HAVE ALLEGED THAT DEFENDANTS, ACTING UNDER COLOR OF STATE LAW, HAVE TAKEN ACTION WHICH CREATES A RACIAL CLASSIFICATION AND PERPETUATES RACIAL SEGREGATION IN THE BUFFALO AND LACKAWANNA SCHOOL SYSTEMS.

Plaintiffs allege that defendants, acting under color of state law, have taken action which not only perpetuates racial discrimination in the public schools in New York State, but also prevents the prompt desegregation of those schools. (A.11). It is further alleged that the "historical context, immediate objective, and ultimate effect" support the proposition that the challenged policy statement serves to continue racial segregation in the schools and deprive plaintiffs and other school children of equal educational opportunity. (A.11). These allegations state a cause of action under both the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States. See, e.g., Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Brown v. Board of Education, 347 U.S. 483 (1954); Evans v. Buchanan, 393 F.Supp. 428, 440 (D. Del. 1975); Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970) aff'd 402 U.S. 935 (1971).

Indeed, the instant action is indistinguishable from Lee v. Nyquist, supra. There, parents of children in the Buffalo schools

challenged the constitutionality of Section 3201(2) of the New York State Education Law which prohibited state education officials and school boards from "assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance." Id. at 712. It was alleged that Section 3201(2) impeded efforts to reduce racial unbalance in the public schools and denied plaintiffs rights secured by the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. §1983. The court agreed with plaintiffs' contention and permanently enjoined the operation of the statute. Judge Hays, writing the opinion for the three-judge district court, concluded that "examination of the 'historical context,' the 'immediate objective' and the 'ultimate effect' of Section 3201(2) ... supports the proposition that the statute serves to continue segregation in the schools and thus 'significantly encourage(s) and involve(s) the state' in racial discrimination." Id. at 716 (quoting Reitman v. Mulkey, supra at 381). Additionally, the court relied upon Hunter v. Erickson, supra, and held that

> The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the Hunter principle.

Id. at 719.

Here - as in Lee - plaintiffs allege that defendants' actions serve to continue segregation in the Buffalo and Lackawanna schools and thereby involve the state in racial discrimination. (A.11). Additionally, plaintiffs maintain that defendants, by their policy statement, have adopted an explicitly racial classification which perpetuates the segregated school systems in these cities. (A.12). Indeed, it is specifically alleged that the "policy statement was issued with the clear purpose and intent of preventing Commissioner Nyquist from proceeding with his efforts to integrate the public school systems. ..." (A.9). The effect of defendants' policy is to impede efforts to reduce racial imbalance in the public schools. (A.12).

It is manifest that, for purposes of defendant's motion to dismiss, these allegations must be taken as admitted. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). While the district court may have treated defendants' motion as one for summary judgment (A.110), that court concluded that defendants' supporting affidavits do not refute the continuing discriminatory impact of the Regents' policy. (A.110). In these circumstances the complaint states a proper claim which, if sustained at the trial on the merits, entitles plaintiffs to a declaration that the Regents' statement violates the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. §1983.

Defendants, however, contend that the complaint "raises no substantial federal question" because the Regents' policy relates to de facto, rather than de jure, segregation. (Appellants' Brief at 24). Such a contention is without merit and was explicitly

rejected by the court in Lee v. Nyquist, supra. There - as here - the Board of Regents argued that it had not acted unlawfully because it has no constitutional duty to end de facto segregation. The court refused to adopt such an argument and held:

> "But the argument that the state has not discriminated because it has no constitutional obligation to end de facto imbalance fails to meet the issue under Hunter v. Erickson. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. Indeed it completely prohibits the implementation of such policies where the local board is not elected. The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification. See Note, Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1080 (1969)."

Id. at 719.

Moreover, contrary to defendants' assertion, the district court may base a finding of de jure segregation upon the fact that the Board's adoption of the challenged statement has the natural and foreseeable effect of perpetuating racial segregation. As this court recently held in Hart v. Community School Board of Education, 512 F.2d 37, 50 (2d Cir. 1975):

> "Unless the Supreme Court speaks to the contrary, we believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which

> have the natural and foreseeable consequence of causing educational segregation. The redeployment of feeder schools is an illustration. We do not think that the Supreme Court has said that intent may not be established by proof of the foreseeable effect on the segregation picture of willful acts."

Equally untenable is defendants' suggestion that the case is moot because of the Board's alleged attempt - made after the initiation of the lawsuit - to alleviate the discriminatory impact of the January 22, 1975, policy statement. (Appellant's Brief at 8-12). Initially, it must be noted that "courts do not favor actions designed to stymie litigation, particularly where the public interest is of the highest priority." Kennedy Park Homes Association v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970), cert. denied 401 U.S. 1010 (1971). Accord Gray v. Sanders, 372 U.S. 368, 376 (1963), United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Here, the acts which purportedly moot the case occurred only after plaintiffs instituted this lawsuit. If this action were dismissed, defendants would be free to adopt another policy which has the same segregative impact as the January 22, 1975 statement and the issue would be "capable of repetition, yet evading review." Southern Pacific Terminal Company v. Interstate Commerce Corp., 219 U.S. 498, 515 (1910). As in United States v. W. T. Grant Co., supra at 632, "defendant[s] [are] free to return to [their] old ways. This together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (footnote omitted).

Additionally, the subsequent statement by the Board of

Regents does not resolve the present controversy. The February 20, 1975 statement is ambiguous, at best, and its effect upon the Commissioner's ability to compel meaningful integration plans is a question of fact which is subject to proof. Indeed, defendant Nyquist indicated that the February statement did not cure the adverse effects of the January policy. In letters to the respective presidents of the Buffalo and Lackawanna Boards of Education, defendant Nyquist stated that, notwithstanding the February statement, he was compelled to conduct another review of the school assignment patterns. (Appellant's Brief at E-11, E-12). Despite the Board's subsequent statement, the plain fact remains that children in Buffalo and Lackawanna continue to be forced to attend segregated schools and be subjected to the deprivation of equal educational opportunity. Plans for integration of these school districts have not been adopted or implemented. The extent to which the challenged policy contributed - and continues to contribute - to the delay in integrating these schools is a factual question which cannot be resolved on the present record. Plainly, a real and continuing controversy exists regarding the present impact of the Board's January policy statement.

Finally, defendants' suggestion that the case is moot ignores the Supreme Court's recent decision in Super Tire Engineering Company v. McCorkle, 416 U.S. 115 (1974). There, the court held that, while the case for injunctive relief was moot, the party's request for declaratory relief should be granted if the litigant establishes "the existence of an immediate and definite governmental

action or policy that has adversely affected and continues to affect a present interest." Id. at 125-26. After reviewing a number of prior decisions, the Court concluded that "[t]he important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." Id. at 126 (and cases cited therein).

Here, plaintiffs have not sought injunctive relief, but rather have requested a declaration[4] that the January statement is unconstitutional because it perpetuates racial segregation in the Buffalo and Lackawanna school systems. The school districts remain segregated despite any action taken by defendants after the institution of the instant action. The critical ingredient found in Super Tire Engineering Company v. McCorkle, supra, also exists in the instant action - namely, governmental action which continues to affect the "behavior of citizens in our society." Id. It must be concluded that plaintiffs have stated a valid claim which has not been rendered moot by actions taken by defendants after plaintiffs instituted this lawsuit.

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[4] DeFunis v. Odegaard, 416 U.S. 312 (1974), relied upon by defendants, is readily distinguishable. There - unlike in the instant action - plaintiff requested neither class action relief nor a declaratory judgment. Id. at 317.

POINT III

THE DISTRICT COURT CORRECTLY HELD THAT IT HAS JURISDICTION TO HEAR THE CLAIMS THAT DEFENDANTS ARE ACTING UNDER COLOR OF STATE LAW TO DEPRIVE PLAINTIFFS OF RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES.

The District Court has jurisdiction pursuant to 28 U.S.C. §1343 to hear plaintiffs' claims that they are being denied rights secured by the Fourteenth Amendment to the Constitution of the United States. That jurisdictional statute provides in pertinent part that federal district courts shall have original jurisdiction of any civil action authorized by law to be commenced

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

28 U.S.C. §1343(3). As the Second Circuit has recently noted,[5] Section 1343(3) is the "jurisdictional counterpart" of the Civil Rights Act of 1871, 42 U.S.C. §1983. Accordingly, the district court had jurisdiction under Section 1343 to hear the instant action which is based upon the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. §1983.

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[5] Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, 490 F.2d 387, 390 (2d Cir. 1973).

a. The District Court has jurisdiction to hear a Section 1983 claim against named public officials.

Defendants assert that the district court lacked jurisdiction under Section 1343(3) and its counterpart, 42 U.S.C. §1983, to hear plaintiffs' claims against the named public officials - defendants McGovern, Genrich and Nyquist. (Appellant's Brief at 17-23). They apparently[6] contend that the Board of Regents is not a "person" within the meaning of the Civil Rights Act, 42 U.S.C. §1983[7] and that, therefore, the members and employees of the Board also fail to qualify as "persons" within the context of that statute. In this manner, defendants suggest that there is neither a valid claim under Section 1983 nor federal court jurisdiction under Section 1343(3).

Contrary to defendants' suggestion, it is well settled that public officials are persons within Section 1983. Moor v. County of Alameda, 411 U.S. 693, 712 (1973); Monroe v. Pape, 365 U.S. 167 (1961); Calo v. Paine, 521 F.2d 411 (2d Cir. 1975); Erdman v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied 409 U.S.

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[6] Defendants characterize this argument in terms of "personal" jurisdiction over the defendants (Appellant's Brief at 15-22). Plainly, the district court correctly concluded that it had personal jurisdiction since each of the defendants resides in New York State and could be properly served in accordance with Rule 4 of the Federal Rules of Civil Procedure. Defendant's argument is actually directed at the subject matter jurisdiction of the district court.

[7] See discussion, infra at 20-25.

889 (1972). In Monroe v. Pape, supra, the Supreme Court concluded that a City is not a person under Section 1983, but held that the named city officials are "persons" and subject to an action brought under the Civil Rights Act. Id. at 187. More recently, this court rejected the very argument now being advanced by defendants. In Calo v. Paine, supra at 413, the court held that

> "the District Court properly denied the contention that, although the action was against named officials of the city, it was nevertheless an action against the city itself which could not be brought under 42 U.S.C. §1983."

In these circumstances, the district court correctly concluded that an action could be brought under Section 1983 against defendants McGovern, Genrich and Nyquist and that Section 1343(3) conferred jurisdiction to hear the claims against these individuals.

b. The district court has jurisdiction to hear plaintiffs' claims against the Board of Regents.

Defendant Board of Regents argues that it is not a "person" under Section 1983 and that the "[District] Court cannot and did not acquire jurisdiction over the case at bar." (Appellant's Brief at 16). In so doing, defendants evidently would have this court mechanically apply the "person" test which the Supreme Court first used in Monroe v. Pape, supra, to preclude a Section 1983 action against a municipal corporation.[8]

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[8] It must be noted that the Board of Regents is not a municipal corporation but rather is the governing board of the University of the State of New York. New York State Education Law §101.

However, in Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974), rev'd on other grounds, 95 S.Ct. 2051 (1975)[9], this court refused to adopt a wooden application of the "person" formula. There, the court held that the New York State Housing Finance Agency is a person under Section 1983 and, in so doing, stated:

> "The State Housing Finance Agency argues that it may not be charged with violation of §1983. While municipal corporations, that is, municipalities, are not deemed "persons" under the Civil Rights Act, see Monroe v. Pape, 365 U.S. 167, 187-190, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1960), "agencies" have always been so deemed. See, e.g. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed. 2d 91 (1971); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968)."

Id. at 1255.

Moreover, on prior occasions, Section 1983 actions have been maintained against defendant Board of Regents. See, e.g. Key[illegible]ian v. Board of Regents, 385 U.S. 589 (1967); Lee v. Nyquist,

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[9] The Supreme Court reversed on the merits but, in so doing, did not disturb this court's determination that the agency is a "person." United Housing Foundation, Inc. v. Forman, 95 S.Ct. 2051, 2057 n.10 (1975).

supra. Similarly, this court has permitted actions to be brought under Section 1983 and its jurisdictional counterpart, 28 U.S.C. §1343, against boards of education. Hart v. Community Board of Education, supra; Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973); James v. Board of Education, 461 F.2d 566 (2d Cir.) cert. denied, 409 U.S. 1042 (1972). Indeed, the Supreme Court concluded, sub silentio, in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), that a board of education is a person within the context of the Civil Rights Act.[10]

While the question of whether a board of education or a school district is a person under the Civil Rights Act may be a "difficult issue,"[11] it is one which the court has answered affirmatively. Hart v. Community School Board of Education, supra; Green v. Waterfront School Board, supra; James v. Board of Education,

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[10] Although the jurisdictional issue was not discussed by the Supreme Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1971), it could have been raised by the Court on its own motion if it were a bar to the action. See City of Kenosha v. Bruno, 412 U.S. 507, 511-12 (1973). It also should be noted that the Court in LaFleur allowed a Section 1983 action against a school board despite its previous determination that a municipal corporation is not a person under that statute even for purposes of injunctive relief. See City of Kenosha v. Bruno, supra.

[11] Mitchell v. West Feliciana Parish School Board, 507 F.2d 662 (5th Cir. 1975). Compare Keckeisen v. Independent School District, 509 F.2d 1062 (8th Cir. 1975), cert. denied, 96 S.Ct. 57 (1975); Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1973); Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971) with Huntley v. North Carolina State Board of Education, 493 F.2d 1016 (4th Cir. 1974); Brown v. Board of Education, 386 F.Supp. 110 (W.D. Ill. 1974).

supra.[12] Accordingly, plaintiffs submit that they have stated a proper Section 1983 claim against defendant Board of Regents which the district court could entertain under 28 U.S.C. §1343.

Moreover, even assuming - only for the sake of argument - that the Board is not a person under Section 1983, the district court nevertheless properly exercised its jurisdiction over plaintiffs' claims against the defendant. Plaintifffs have alleged that the Board's actions have the purpose and effect of denying rights secured by the Fourteenth Amendment. Accordingly, independent of any claim under the Civil Rights Act, plaintiffs have stated a claim for declaratory relief directly under the Constitution. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education, supra; Bell v. Hood, 327 U.S. 679 (1946); Roane v. Callisburg Independent School District, 511 F.2d 633, 635 n.1 (5th Cir. 1975); Matterson v. Long Island State Park Commission, 442 F.2d 566 (2d Cir. 1971); Brown v. Board of Education, 386 F.Supp. 110, 121 (N.D. Ill. 1974). Although this court, sitting en banc, has reserved the question of whether an action for damages may be based directly on the Fourteenth Amendment,[13] it is well settled that an action for declaratory or injunctive relief can be brought

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[12] In certain respects, whether or not defendant Board of Regents is a person is simply a pleading issue since, on remand, plaintiffs could move to amend the pleadings to name all the members of the Board. See, e.g., Akron Board of Education v. State Board of Education, 490 F.2d 1285, 1291 (6th Cir.), cert. denied, 417 U.S. 932 (1974).

[13] Brault v. Town of Milton, ___ F.2d ___ (2d Cir. 1975)(en banc) (74-2370)(October 1, 1975).

directly under a constitutional provision. Bolling v. Sharpe, supra. As the Supreme Court stated in Bell v. Hood, supra at 684, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights secured by the Constitution. ..."

Plaintiffs contend that jurisdiction to hear the claim against the Board of Regents could be premised upon the pendent jurisdiction doctrine. Both the constitutional claim against the Board and the civil rights claim against the named individual defendants derive from a "common nucleus of law and fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Indeed, it is the discriminatory impact of the challenged statement which serves as the basis of the claims against both the Board of Regents and the individual defendants. Plainly, plaintiffs' claims are such that they "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, supra at 725. In these circumstances, the district court could exercise its pendent jurisdiction over the constitutional claim against the Board of Regents. That the pendent claim is against a Board which is not a party to the jurisdiction granting claim does not defeat pendent jurisdiction. As this court said in Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972), "the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of Gibbs against a person not a party to the primary jurisdiction-granting claim. ..." (citations omitted).

Judicial economy, as well as the convenience and fairness to the litigants could only be served by the district court's exercise of pendent jurisdiction.

Accordingly, plaintiffs submit that the district court properly held that it had jurisdiction to entertain plaintiffs' claim against defendant Board of Regents.

POINT IV

VENUE PROPERLY LIES IN THE WESTERN DISTRICT OF NEW YORK

Defendants also urge that the district court's determination should be reversed upon the ground that the court "lacked jurisdiction because of improper venue." (Appellant's Brief at 22-23). Initially, it must be noted that such an assertion ignores the fact that venue is a doctrine of convenience, rather than one of jurisdiction. 1 Moore's Federal Practice ¶0.140[1.-2] at 1310-1312. Moreover, defendants' contention finds no support in the statutory provisions relating to venue.

a. Venue is proper under 28 U.S.C. §1392(b) as one of the defendants resides in the Western District of New York

The district court correctly held that venue is proper in the Western District of New York under 28 U.S.C. §1392(a) which provides:

> (a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

Here, as the Court noted, defendant Genrich[14] resides in the Western District of New York and accordingly, venue properly lies in that

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[14] Contrary to defendants' suggestion (Appellant's Brief at 23) defendant Genrich is a proper party in this action. Indeed, all the members of the Board of Regents are proper parties and could be named as defendants. See note 12, supra.

District. (A.110-111).

b. Venue is proper under 28 U.S.C. §1391(b) as plaintiffs' claim arose in the Western District of New York.

Venue is also proper in the Western District of New York by virtue of 28 U.S.C. §1391(b) which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(emphasis added).

Plaintiffs maintain that their "claim arose" in Lackawanna and Buffalo, New York and that venue is proper in the Western District of New York. Although the challenged policy statement was adopted in Albany, New York, which is in the Northern District, the actual injury to the plaintiffs is occurring in the cities located in the Western District of New York. It is alleged that defendants' actions perpetuate racial segregation in the public schools in Buffalo and Lackawanna and deprive students in those schools of equal educational opportunity. In these circumstances, plaintiffs' claim arose in the Western District where the "weight of contacts"[15] and place of injury exist. See Iranian Shipping Lines, S.A. v. Morantes, 377 F.Supp. 644, 648 (S.D.N.Y. 1974); Jimenez v. Pierce, 315 F.Supp. 365 (S.D.N.Y. 1970); Albert Lavine Associates v. Bertoni and Cotti, 314 F.Supp. 169 (S.D.N.Y. 1970).

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[15] Philadelphia Housing Authority v. American Radiation & S. San Corp., 291 F.Supp. 247, 260-61 (E.D. Pa. 1968).

CONCLUSION

For the foregoing reasons, defendants' appeal from an interlocutory order should be dismissed or, alternatively, the decision of the district court should be affirmed.

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Respectfully submitted,

DAAN BRAVEMAN, ESQ.
GREATER UP-STATE LAW PROJECT
MONROE COUNTY LEGAL
ASSISTANCE CORPORATION
80 West Main Street
Rochester, New York 14614

STUART R. COHEN, ESQ.
GEORGE H. HEZEL, ESQ.
LEGAL AID BUREAU OF BUFFALO
281 Ridge Road West
Lackawanna, New York 14218

NATHANIEL JONES, ESQ.
N.A.A.C.P.
1790 Broadway
New York, New York 10010

Attorneys for Plaintiffs-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1975, I served the foregoing brief upon counsel for appellants, John P. Jehu, Esq., State Education Department, Washington Avenue, Albany, New York, 12234, Robert D. Stone, Esq., State Education Department, Washington Avenue, Albany, New York 12234, and Edward L. Robinson, 3400 Marine Midland Center, Buffalo, New York 14203, by causing copies to be mailed to them postage prepaid.

Dian Braveman

DIAN BRAVEMAN, ESQ.